Supreme Court, U.S.
FILED

001452 MAR 25 2001

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

THOMAS V. OLUP,

Petitioner

v.

COUNTY OF ALLEGHENY DEPARTMENT OF AVIATION, ET AL.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Jeffrey T. Olup, Esq.
Counsel of Record for Petitioner
BASSI, McCUNE & VREELAND, P.C.
111 Fallowfield Avenue
P.O. Box 144
Charleroi, PA 15022
(724) 483-5502

85 pp

Questions Presented For Review

- Whether such a substantial lack of due process and fundamental fairness existed in both the conduct of the trial and in the cursory appellate review given to Olup's case that the Supreme Court must exercise review in this instance.

- Whether there was error in the grant of summary judgment relative to Olup's disability claims under the ADA and/or Rehabilitation Act.

- Whether there was error in the denial of Olup's Motion for New Trial.

- Whether jurors from Allegheny County were improperly stricken from the panel "for cause".

- Whether an abuse of discretion arose in limiting the total trial time available to Olup, in constraining trial counsel to complete the case without time for rebuttal witnesses, and in constraining the time for adequate and competent cross-examination of defense witnesses.

- Whether there was an abuse of discretion in allowing undisclosed and last minute witnesses to be called by the Respondents.

- Whether there was error in the denial of Olup's Motion in Limine to exclude evidence of Olup's performance in employment.

- Whether there was error in the allowance of evidence of Olup's performance in employment as part of the Respondents' case.

- Whether there was error in allowing the Respondents to elicit opinions and evidence relative to Olup's performance with Respondents and alleged past performance with previous employers.

- Whether error existed in the instructions to the jury on the incorrect legal standard relative to Olup's claims.

List Of All Parties To The Proceeding In The United States Court Of Appeals For The Third Circuit

- Thomas V. Olup (Petitioner)
- County of Allegheny Department of Aviation
- Mike Dawida, individually and in his capacity as Commissioner of Allegheny County
- Robert Cranmer, individually and in his capacity as Commissioner of Allegheny County
- Larry Dunn, individually and in his capacity as Commissioner of Allegheny County
- Peter Florian, individually and in his capacity as Deputy Director and Acting Director of Department of Aviation
- William Stuenkel, individually and in his capacity as Deputy Director of Department of Aviation
- Scott O'Donnell, individually and in his capacity as Director of Department of Aviation
- Herb Higginbotham, individually and in his capacity as Director of Aviation
- Guy Tumolo, individually and in his capacity as Director of Department of Aviation

(Respondents)

Table of Contents

Petition	
Questions Presented for Review	i
List of All Parties to the Proceeding in the United States Court of Appeals for the Third Circuit	iii
Table of Cited Authorities	v
Citations to Opinions and Orders Entered in This Case	vii
Statement of the Basis for Jurisdiction of the Supreme Court	viii
Constitutional Provisions, Statutes, Ordinances and Regulations Involved in the Case	ix
Concise Statement of the Case	1
Argument	8
Olup's Disability Claims	8
Substantial Prejudicial Error/Lack of Fundamental Fairness	11
a. Jurors Stricken "for cause"	12
b. Total Trial Time	14
c. Undisclosed and Last Minute Witnesses	17
d. Denial of Transcript	19
e. Denial of Oral Argument	21
Employment Performance Evidence	21
a. The Motion in Limine	22
b. The Opinion Testimony	26
Jury Charge	28

Table of Cited Authorities

Decisional Authority:

Albertsons, Inc. v. Kirkinburg, 527 U.S. 555 (1990) 9

Arbruster v. Erie Civic Center, 537 F. Supp. 484 (W.D. Pa. 1995) 23

Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326 (3d Cir. 1995) 23

Farmer v. National City Corp., 1996 W,K, 887478 (S.D. Ohio) 8

Mt. Healthy v. Doyle, 429 U.S. 274, 287 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977) 568 (citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S.C. 252, 270-72, N. 21, 97 S.Ct. 555, 50 L.Ed. 450 (1977) 28, 29

McDonnell Douglas Corp. v. Green, 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) 16

Saint Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993) 16

Smith v. Borough of Wilkinsburg, 147 F.3d 272, 275-276 (3d Cir. 1998) 30

Sorba v. Pennsylvania Drilling Co., Inc., 821 F.2d 200 (3d Cir. 1987) 23

Suppan v. Dadonna, 203 F.3d 228, 235-236 (3d Cir. 2000) 28

Sutton v. United Airlines, Inc., 527 U.S. 471, 4833 (citing *Bragdon Abbott*, 524 U.S. 624 9

Swain v. Hillsborough County School Board, 146 F.3d 855 (11th Cir. 1998) 8

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981) 16
United States v. Calabrese, 942 F.2d 218 (3d Cir. 1982) 13

Statutory Authority:
28 U.S.C.A. §1254 viii
29 U.S.C. §621 et seq. 7
43 P.S. §951 et seq. 7
42 U.S.C. §1983 5, 7
42 U.S.C. §1981(a) 7
42 U.S.C. §12101 et seq. 7
29 U.S.C. §794 7
29 U.S.C. §626(c)(1) 8
28 U.S.C. §1331 8
29 U.S.C. §1343(a)(4) 8
29 U.S.C. §1367 8
29 U.S.C. §2201 8
29 U.S.C. §2202 9
28 U.S.C. §753 20, 21

Miscellaneous
United States Constitution, First Amendment 7
Fourteenth Amendment 7
Pennsylvania Constitution, Article I, Section 7 7
Federal Rule of Civil Procedure 26(A)(3) and 37(c)(1) 18
Rule of Appellate Procedure 10(3) 20

Citations To Opinions And Orders Entered In This Case

- Pre-trial Status Conference Order dated November 12, 1998, noting "Plaintiff's counsel estimates two weeks for trial."

- Opinion and Order of Court dated April 26, 1999, per Donetta W. Ambrose, U.S. District Judge, on Respondents' Motion for Summary Judgment, granting in part and DENYING in part.

- Order dated September 23, 1999, DENYING Petitioner's Motion in Limine seeking to exclude evidence concerning performance in employment.

- Rulings of the trial judge (9/27/99-10/5/99) DENYING requests for offers of proof on the witnesses Florian, Hardy, Torockio and Walluck; and in unreasonably limiting trial time.

- Opinion and Order of Court dated November 30, 1999, per Ambrose, J., DENYING Petitioner's Motion for New Trial.

- Order of Court (handwritten) dated May 31, 2000, per Ambrose, J., DENYING Petitioner's Motion for Correction or Modification of the Record and Motion for Leave of Court to Obtain Original Stenographic Notes.

- Order of Court dated September 1, 2000, per Sloviter, Circuit Judge, DENYING Petitioner's Motion for Oral Argument.

- Order of Court dated September 1, 2000, per Sloviter, C.J., DENYING Petitioner's Motion for Correction or Modification of the Record and Motion for Leave of Court to Obtain Original Stenographic Notes.

- Judgment and Memorandum Opinion dated September 20, 2000, affirming the Order of the District Court entered November 30, 1999.

- Order of Court dated October 27, 2000, DENYING Olup's Petition for Panel Rehearing.

Statement Of The Basis For Jurisdiction Of The Supreme Court

The Judgment and Memorandum Opinion of the United States Court of Appeals for the Third Circuit, sought to be reviewed, was entered on September 20, 2000.

On October 27, 2000, the Third Circuit entered an Order denying a Petition for Panel Rehearing.

The Supreme Court has jurisdiction to review on a Writ of Certiorari by virtue of 28 U.S.C.A §1254.

Further, the Third Circuit's opinion affirming the trial court's decision has so far departed from the accepted and usual course of judicial proceedings, and sanctions such a departure by the lower court, as to call for an exercise of the Supreme Court's supervisory power.

More specifically, there was a substantial lack of due process and fundamental fairness in both the conduct of the trial and in the cursory ap-

pellate review given to Olup's case that the Supreme Court must, and should grant Olup's Petition for Writ of Certiorari.

Constitutional Provisions Statutes, Ordinances and Regulations Involved in the Case

I. CONSTITUTIONAL PROVISIONS:
- A. U.S. Constitution
  - 1. First Amendment
  - 2. Fourteenth Amendment
- B. Pennsylvania Constitution
  - Article I, Section 7

II. STATUTES
- A. Court Reporter Act
  - 1. 28 U.S.C. §753 – Reporters
- B. Jurisdiction and Venue
  - 1. 28 U.S.C. §1254 – Courts of appeals; certiorari; certified questions
  - 2. 28 U.S.C. §1331 – Federal Question
  - 3. 28 U.S.C. §1343(a)(4) – Civil rights and elective franchise
  - 4. 28 U.S.C. §1367 – Supplemental jurisdiction
- C. Declaratory Judgment
  - 1. 28 U.S.C. §2201 – Creation of remedy
  - 2. 28 U.S.C. §2202 – Further relief
- D. Age Discrimination in Employment Act
  - 1. 29 U.S.C. §623 – Prohibition of age discrimination
  - 2. 29 U.S.C. §626(c)(1) – Record keeping, investigation, and enforcement

E. Rehabilitation Act
1. 29 U.S.C. §794 – Non-discrimination under federal grants and programs
F. Civil Rights
1. 42 U.S.C. §1981 – Equal rights under the law
2. 42 U.S.C. §1983 – Civil action for deprivation of rights
G. Americans With Disabilities Act
1. 42 U.S.C. §12112 – Discrimination
H. State Statute – Pennsylvania Human Relations Act
1. 43 P.S. §955 – Unlawful discriminatory practice

Concise Statement of the Case

In November 1986, Thomas V. Olup, a Registered Professional Engineer, was employed by the County as an Assistant Director of Engineering and Planning in the Department of Aviation. Shortly thereafter and unknown to Olup, his title was unofficially changed to Assistant Director of Special Projects. Formally and unofficially, he was only advised of this change in December of 1989, some three years after his hiring. Olup was born on December 22, 1935. He has been a Registered Professional Engineer since 1963. He had been a Registered Professional Engineer in the states of Pennsylvania, Ohio and West Virginia.

In his employment through February 1996, when he was discharged, he was twice demoted (transferred) in terms of his position, duties and responsibilities, which were transferred to younger and less qualified personnel. The County had maintained, previously, that these were merely transfers. His revised title was never changed, but attempts were made to change it. During this period of time, Olup was denied job training, computer training, equipment, support services, continuing education and seminars in his profession.

The first demotion (transfer) was from his position in the Engineering Section where he was responsible for the planning design and construction of the new Pittsburgh International Airport (Midfield) and in many other related projects and functions, including state and federal funding and active involvement in professional service contracts until about June of 1994.

At that time, Olup was demoted (transferred) to a lesser position to handle, establish and create

contracting functions and offices. His position in contracting continued until May 1995 when he was again demoted (transferred) from the contracting position to a position in the Residential Sound Insulation Program to mitigate twelve potential lawsuits against the County of Allegheny, Department of Aviation. In that position, Olup had no identified written duties or responsibilities, as defined by airport management or deputy directors and/or director. The work he performed in that position was constantly undermined, directed by, and monitored by Peter Florian, then Deputy Director of the Department of Aviation, with concurrence of then Director H. Higginbotham.

Olup had no policymaking position, nor hiring authority or influence in any position he held while an employee of the County.

On February 23, 1996, Olup was informed that he was terminated from employment, effective immediately. The specific stated reason for termination was **"THROUGH NO CAUSE OR ACT OF HIS OR HER OWN"**, which appears on Olup's Termination of Service document signed by Peter Florian, his immediate titular head, who had the title of Acting Director. Olup was then 60 years old and approximately nine months short of being vested for retirement benefits through the County's retirement program. Factually, a countywide buyout program was instituted to be effective on February 29, 1996. Olup's official date of termination was effective February 28, 1996. Therefore, Olup was deemed not eligible for the voluntary buyout program of the County by one day.

Again, that same Termination of Service document certified to the Retirement Board of the County that Olup's service would terminate on Feb-

ruary 28, 1996 – one day before eligibility for the County buyout. This matter was deemed and ruled by the district court to be somehow irrelevant or improper for Olup's counsel to argue to the jury at the time of closing argument.

In early 1993, Olup was diagnosed with prostate cancer. He informed his superiors at the Department of Aviation and other appropriate personnel of his condition and impending surgery. In June 1993, Olup underwent prostate surgery and convalesced at home. Upon returning to work, he was required to wear an incontinence pad and those at work were aware that he had special ongoing needs and limitations. Olup suffered from nasal polyps as well, which condition was aggravated by an assigned coworker smoking in a non-smoking facility (the Pittsburgh International Airport). This individual, A. Sirabella, was assigned to work with Olup in the Contracting Section, established by Olup. Further side effects from the surgery impacted his quality of life. These included nasal polyps and impotence.

During his employment, Olup was asked on various occasions about his political party affiliations and whether he had, in fact, supported the elected Republican Commissioners, Lawrence Dunn and Robert Cranmer. Olup was a registered lifelong Democrat and had always supported that party. He is an elected Democratic committeeman for the Municipality of Baldwin Borough, Allegheny County, Pennsylvania.

At each demotion (transfer) and ultimate termination, Olup was replaced by younger individuals who assumed his duties and responsibilities, despite the fact that he had performed his

duties and responsibilities in a fully competent, timely and professional manner.

At trial, Olup was limited to, and maintained at trial that he was targeted for discharge due to both his age and his political party affiliation. However, the trial court improperly restricted opinion testimony on the issue of the "political" reasons for Olup's firings and actually led the witnesses, Tom Jargiello and Michael Dawida, away from appropriate "political pattern and practice" testimony.

Although Olup pled violations of his civil rights sounding in First Amendment protections of freedom of speech and association, these claims were discontinued by Olup's trial counsel without Olup's authorization and approval. There is no present indication of record in the trial transcript, or docket, as to when this occurred. Nevertheless, civil rights claims were not subject of trial. Olup filed Motions with both the trial court and Third Circuit to both correct and modify the transcript and to obtain the original stenographic notes of the court reporters. Via Orders of May 31, 2000 and September 1, 2000, the lower courts denied these Motions, respectively, and this issue will be renewed with this Court.

At trial, Olup was confronted with a litany of hostile witnesses who were permitted to testify as to their impressions and lay opinions on Olup's job performance while at the County and at a previous employer. All of these witnesses were present, active employees of the County or past County employees with a vested interest to testify against Olup. Further, the total time allotted to Olup, during trial, was unduly restrictive and trial counsel was repeatedly admonished that the "clock was running". Last minute and undisclosed witnesses

were permitted to testify. The trial court erred in its instructions to the jury. Fatal defense exhibits were entered into evidence over Olup's counsel's objection. Olup's disability claims were dismissed via grant of summary judgment.

Procedurally, Olup commenced suit against the County of Allegheny Department of Aviation on January 22, 1997, alleging that his termination from employment on February 23, 1996, was premised upon his age, in violation of the Age Discrimination in Employment Act. Approximately nine months later, Olup amended his Complaint to include a claim for age discrimination under the Pennsylvania Human Relations Act.

On January 13, 1998, Olup initiated a second suit against the County of Allegheny and its then current Commissioners, both in their official and individual capacities. Olup initially claimed that the defendants to that action violated his civil rights under 42 U.S.C. §1983 by retaliating against him for the exercise of his First Amendment rights to free speech and free association. Approximately one month later, Olup amended this second action to include two additional counts.

Specifically, Olup claimed that his termination arose as a result of disability discrimination in violation of the Americans With Disabilities Act (ADA), and of the Rehabilitation Act. The Revised Complaint also added five additional defendants, all of whom were former directors or deputy directors of the Greater Pittsburgh/Pittsburgh International Airport (Department of Aviation), upon the advice and direction of Olup's previous legal counsel.

Initially, Judge William Standish was assigned to the case. However, when Standish

recused himself on Olup's counsel's Motion, the case was reassigned to Judge Donetta W. Ambrose.

After extended discovery, Respondents presented a Motion for Summary Judgment that was granted in part and denied in part. The Motion was further granted as to all claims against the parties Dawida, Stuenkel, O'Donnell, Higginbotham, Tumolo, and Florian. The Motion was denied in all other respects.

The case proceeded to trial before Judge Ambrose on September 27, 1999, concluding on October 5, 1999. The jury rendered its verdict in favor of the remaining defendants and against Olup. Olup filed a Motion for New Trial on October 15, 1999, which set forth eight assignments of error warranting a new trial.

Leave of Court was obtained on November 5, 1999, to allow Olup to amend his Motion for Post-trial Relief to set forth one additional basis for relief. Defendants responded to the Motion for Post-trial Relief. The trial court, per Judge Donetta Ambrose, summarily denied Olup's Motion, via Opinion and Order of Court dated November 30, 1999.

An appeal was originally taken to the United States Court of Appeals for the Third Circuit, from the Opinion and Order of Court dated November 30, 1999, denying Olup's Motion for New Trial. Appeal was also taken from the Opinion and Order of Court dated April 26, 1999, granting partial summary judgment (which dismissed Olup's claims under the ADA and Rehabilitation Act and dismissed all claims asserted against Defendants Dawida, Stuenkel, O'Donnell, Higginbotham, Tumulo and Florian).

Olup's position in the appeal to the Third Circuit was that fundamental error occurred during

the course of the trial and in the totality of the trial that warranted the grant of a new trial by the United States Court of Appeals for the Third Circuit.

The Third Circuit denied your Petitioner's Motion for Oral Argument via Court Order of September 1, 2000.

On September 20, 2000, the Third Circuit entered an Unpublished Memorandum Opinion and Judgment affirming the Order of the District Court entered on November 30, 1999. Olup filed a timely Petition for Panel Rehearing, which the Third Circuit by Order dated October 27, 2000 denied Petition.

The basis for the District Court's subject matter jurisdiction of Olup's claims is as follows:

Olup's original suit was premised upon age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* The amendment to the original Complaint included a claim for age discrimination under the Pennsylvania Human Relations Act, 43 P.S. §951 *et seq.*

Olup's second suit claimed a violation of civil rights under 42 U.S.C. §1983 and 42 U.S.C. §1981(a) by retaliation against him for the exercise of his First Amendment rights to free speech and free association protected by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution. The amendment to this Complaint included a claim of disability discrimination in violation of the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* and of the Rehabilitation Act, 29 U.S.C. §794.

The District Court had jurisdiction pursuant to 29 U.S. §626(c)(1) and 28 U.S.C. §§ 1331, 1343(a)(4) and 1367, as well as §§2201 and 2202.

ARGUMENT

Olup's Disability Claims

The District Court granted the Respondent's Motion for Summary Judgment relative to Olup's disability claims under the Americans with Disabilities Act and Rehabilitation Act. The District Court held that Olup did not have a "disability" within the meaning of the ADA.

Relative to Olup's prostate cancer, the Third Circuit concluded that the District Court properly relied on *Swain v. Hillsborough County School Board*, 146 F.3d 855 (11th Cir. 1998) and *Farmer v. National City Corp.*, 1996 W.L. 887478 (S.D. Ohio) to grant summary judgment against Olup on the ADA/RA claim.

Olup also claimed that his nasal polyps constituted a disability under ADA. The District Court did not deal with this argument in its ruling. The Third Circuit, however, stated that Olup offered no evidence that his polyps substantially limited a major life function, nor did he allege that they did.

Therefore, the Appeals Court found that the District Court properly concluded that Olup had not produced sufficient evidence for the ADA claim to survive a Motion for Summary Judgment.

In this Petition, Olup's position is that the lower court erred in granting the County's Motion for Summary Judgment relative to Olup's disability claims under the Americans with Disabilities Act

and Rehabilitation Act. Moreover, the United States Court of Appeals for the Third Circuit also erred in upholding the grant of the Motion.

As this Court wrote in *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 483 (citing with authority *Bragdon v. Abbott*, 524 U.S. 624) "whether a person has a disability under the ADA is an individualized inquiry." In *Albertsons, Inc. v. Kirkinburg*, 527 U.S. 555 (1999), this Court stated that: "the determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment of the life of the individual." *Id.* 527 U.S. 555, 566. This Court has also said that: "The determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis." *Id.*

In this instance, there can be no question that Olup suffers from a physical impairment – the record was clear that Olup had prostate cancer, which is subject to recurrence. As a consequence, he suffers from incontinence and impotence. Moreover, Olup substantially suffers from nasal polyps – making him especially sensitive to atmospheric and environmental changes – like cigarette smoke.

Further, these impairments substantially limit or restrict several of Olup's major life functions, aside from incontinence, impotence and mobility. Olup is significantly restricted in his ability to breathe. Further, if Department of Aviation supervisors permitted Olup's assistant to smoke cigarettes near to Olup (in a designated smoke-free environment), and this affected his ability to breathe, it logically follows that it affected his ability to work in the Department of Aviation as well.

As Olup was able to factually demonstrate substantial limitations and restrictions of major life activities, it was error to summarily dismiss these claims on that basis.

Moreover, a significant factual issue was presented as to whether the County "regarded" Olup as having an impairment. The lower court relegated this prong of the "disability" test to a footnote at Page 10 of its Opinion and Order of April 26, 1999, noting that the "record is devoid of any evidence indicating that the defendants 'perceived' him to have a disability." The Third Circuit never addressed the issue as to whether the County "regarded" Olup as having an impairment.

The County (and its agents) knew Olup had surgery for prostate cancer in 1993, which rendered him incontinent and required that he wear incontinence pads. Olup told his supervisors he would be off work for surgery, including Guy Tumolo and William Stuenkel. Stuenkel knew of Olup's prostate cancer. Both Peter Florian (a supervisor) and Tony Siribella (the assistant) knew of Olup's incontinence. Florian knew of Olup's ongoing "private" medical condition. Olup's incontinence required that he spend extended periods of time in the restroom. Therefore there is no question that coworkers, supervisors and management knew and perceived Olup's disability.

Also, the Midfield Terminal (where the Department of Aviation offices were located) was designated as a smoke-free environment. Mr. Siribella continued to smoke in the office he shared with Olup. Olup asked his supervisors to order Siribella to cease this activity, but they turned a deaf ear. Being forced to breath this direct smoke aggravated

Olup's polyps, and further increased his fear of cancer recurrence.

Moreover, coworkers were quoted to say, "How long can he last, anyway?" about Olup's employment and related prostate cancer condition.

A fact finder could reasonably conclude that, in a continuing effort to force Olup out, Peter Florian, his supervisor, not only demoted and/or transferred him to inferior positions, without sufficient assistance and support, but he placed Olup in an office with a known smoker who flaunted, without reprisal, the no-smoking rule. Olup, who had recently experienced cancer surgery, and was terrified of its recurrence, was forced to work in a smoke-filled office. The fact finder may draw the inference that Florian was callous and hostile to Olup's disabilities and use Siribella as a wedge to try to drive Olup out of employment, either directly, or through a hostile environment.

Accordingly, the lower court should not have dismissed Olup's disability claim. As a fact finder could have found that one of the reasons that Olup was terminated was because of his disability, or that he was terminated because the County regarded Olup as disabled and that the termination was due to such perceived disability and that this ultimately made him politically expendable because of his age and disability, summary judgment was in error.

Substantial Prejudicial Error/Lack of Fundamental Fairness

As noted, the trial court denied Olup's Motion for a New Trial. Denial of the Motion was affirmed by the Court of Appeals for the Third Circuit.

Under the circumstances of this case, it is clear that substantial prejudicial error exists in the record and substantial justice was not done within the trial of this case. Moreover, there exists a lack of fundamental fairness in both the trial as well as the appellate process.

a. Jurors stricken "for cause".

During the voir dire stage of jury selection, the court "for cause" struck six potential jurors due to their residency in Allegheny County.[1] Residency within the county alone is insufficient ground to dismiss a juror for "cause". Consequently, the jurors from Allegheny County were improperly stricken from the panel.

The Appeals Court concluded that the jurors were dismissed for cause only when they indicated to the court that they could not render a fair and impartial verdict because of a range of beliefs concerning politicians, workplace discrimination, and like matters. However, in reaching this conclusion,

---

[1]In the lower court's Opinion and Order of November 30, 1999, the court admonished appellate counsel that if he had "bothered to ask trial counsel or even his client about this argument, he would know it was entirely inaccurate." Olup's appellate counsel was not in attendance at trial. Olup was told by his trial counsel to not attend the voir dire stage of proceedings. Olup later inquired of his trial counsel as to why none of the jurors was from Allegheny County. Olup learned from trial counsel that those jurors were stricken "for cause". Olup questioned what was the "cause"; Olup was advised by trial counsel that the "cause" was residency in Allegheny County. Thus, this issue was raised at the trial court level as reasonable inquiry was made under the circumstances.

the Appeals Court noted that no transcript existed from the voir dire. Moreover, the Third Circuit relied upon the District Court's statement that no jurors were stricken because of their residency.

While this issue is more commonly found in the criminal context (see e.g. *United States v. Calabrese*, 942 F.2d 218 (3d Cir. 1982), Olup respectfully argues that application of the "cause" requirement in a civil case is no less compelling here.

It is Olup's understanding that at least six jurors were stricken for cause due to their residency in Allegheny County. As it turned out, no potential juror from Allegheny County was to be found on the jury of eight sworn to try the case.

The issues in the case were not so substantial such that they would eliminate consideration of any potential juror from Allegheny County. Had the issues in the case had some far-reaching effect upon all residents of the County, Olup could possibly understand the need to strike County residents if, and only if, they represented that they could not be fair and impartial. Most importantly, if Olup is to be afforded a jury of his peers, at least some of those individuals must be found among the citizens of the area within which he resides – in this instance, Allegheny County. Further, Olup filed two separate Motions with the lower court, specifically related to the trial transcript. In both of those motions, your Petitioner sought to correct or modify the record, and to obtain the original stenographic notes so to correct the record to reflect what actually occurred at the trial court level, during trial, and while the trial judge was present.

Without an accurate and complete trial transcript, your Petitioner was severely restricted in his ability to brief and argue the issue and other issues

on both the trial court and appellate court level. As Olup did not have an opportunity to correct the record, and as his requests were denied, there is substantial error in both the lower court and the intermediate Appeals Court's conclusion that this argument is without merit.

b. Total Trial Time

Olup maintains that it was error or an abuse of discretion to limit the amount of total trial time available to him and in constraining his counsel to complete the case without sufficient time for rebuttal witnesses. Moreover, it is Olup's position that the Third Circuit erred in also concluding that the time restrictions were reasonable under the circumstances.

Limiting the time for trial prohibited Olup from effective cross-examination of defense witnesses, and calling rebuttal witnesses who would directly contradict the parade of defense witnesses who were permitted to render lay opinions about their perception of Olup's work performance with the County and with previous employers, and closing argument (defense counsel stated that these witnesses would be "very quick" and "no more than five minutes", and the court allowed it. Olup's counsel objected.)

More specifically, throughout the course of the trial, the trial court repeatedly admonished Olup's counsel about the total time allotted to him, and the total time permitted for completion of the case.

As a particular example, on Friday, October 1, 1999, the court advised and admonished Olup's counsel that he had 85 minutes to finalize Olup's

case.[2] Subsequently, opposing counsel took two additional days with witnesses whose testimony is subject of other portions of this Petition. Olup's rebuttal witnesses were ready to proceed to testify subsequent to the County's case. However, due to the time constrains, Olup's counsel was required to either spend limited time on cross-examination, proceed to rebuttal, or to reserve time for closing argument. Finally, Olup's counsel was forced to limit cross-examination and reserve time for closing argument. The lower court, of course, dictated the constraints.

Indeed, on at least one occasion during trial, the lower court stated that if Olup's counsel sought to pursue rebuttal witnesses and rebuttal evidence, he would not be afforded time for closing argument. Thus, Plaintiff was constrained to proceed under the court's dictates.

However, more damaging was the trial judge's overall seven-day "hurry-up" dictates to counsel that prejudiced Olup's case. The trial judge dictated 1,050 minutes of total time.

The trial court cannot impose unreasonable or artificial constrains under the guise of a fair trial where adherence to those constraints prejudices a party. Specifically, the onus falls on Olup to prove his case with arbitrary time limits and constraints.

---

[2] This admonition does not appear in the notes of testimony. Due to this omission, as well as other substantial errors and omissions in that text, Olup filed his motions with the lower court on May 12, 2000, as well as with the Appeals Court on or about June 23, 2000, requesting correction and modification of the record as well as release of the reporter's notes to have a separate transcript prepared. The lower courts denied both motions.

This is especially true in light of the plaintiff's burden of proof in age, political and First Amendment cases. In each instance (as here), the plaintiff has the final burden of proving that the employer's proffered reason for termination was a pretext. The plaintiff must show either that the employer's explanation for discharge is not credible, or that plaintiff's discharge was based more upon discriminatory motives. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981) and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993).

In discrimination "pretext" cases, the plaintiff must, of necessity, wait to hear the defendant's proof before he proceeds with any rebuttal. The plaintiff need not specifically address nor anticipate, nor disprove the employer's offered reason for discharge in plaintiff's own case in chief. Thus, the time for rebuttal is key – the plaintiff must, at that time, be permitted to counter the employer's "non-discriminatory reason" for discharge through any rebuttal evidence available. In many respects, this opportunity for rebuttal is more critical that the time for plaintiff's case in chief. *Id.*

In literally running the clock on Olup, the trial court circumscribed Olup's right to proceed to disprove the County's proffered reason for termination – lack of performance. Olup was, therefore, without sufficient time to adequately counter the County's proof at trial.[3] As the time constraints im-

---

[3] Curiously, a Pre-trial Status Conference Order of the trial court dated November 12, 1998, specifically notes that, "Plaintiff's counsel estimates two weeks for trial." Somehow, that estimate was reduced to seven

posed for trial of this case were unreasonable, a new trial should have been granted.

c. Undisclosed and Last-Minute Witnesses

Olup maintained that the lower court erred or abused its discretion in allowing the County to present literally last-minute witnesses and other witnesses who were not disclosed on pre-trial statements or in pre-trial proceedings. Moreover, the intermediate court of appeals' summary affirmance of the District Court's rulings is also in error.

The subject witnesses were called by the County solely for the purpose of offering lay opinions on Olup's perceived work performance with the County and with previous employers. Those witnesses included one Peter Florian and one Theodore Hardy.

Further, the courts erred or abused their discretion in allowing one particular witness – John Walluck – to offer lay opinion about Olup's attempts at obtaining employment with the City of Pittsburgh Board of Education, without prior notice, who was not identified on any witness list or pre-trial document. Walluck testified, in substance, that Olup was never given an offer of employment.

Prior to his being called as a witness, the County advised the Court that Walluck's testimony was necessary to show that Olup was "a liar" or

---

days via a Pre-trial Conference Order of July 9, 1999. The trial court noted in that July 9, 1999 Order that the time may be amended "by one day either side". The actual trial time was for six days – with closings occurring on the seventh day in the morning.

that he was "lying" about his attempts to find new employment.

Pursuant to Federal Rule of Civil Procedure 26(a)(3)(A) and 37(c)(1), a party has a duty to disclose the identity of witnesses and whether they will actually be called or possibly called if the need arises. These disclosures must be made before trial. Failure to disclose this type of information shall result in the exclusion of that evidence at trial. While these dictates are not inviolate, where a party does not comply with these rules and prejudice or harm results, the evidence must be excluded. In this case, the County was permitted to call Florian, Hardy and Walluck. Even during the course of the case, defense counsel repeatedly vacillated on whether these witnesses would, in fact, be called.

Further, the testimony and cross-examination of these undisclosed and last-minute witnesses took up time for cross-examination – time that was then subtracted from Olup's opportunity for rebuttal. Thus, the error was compounded: undisclosed and last-minute witnesses were permitted to provide irrelevant testimony, all of which used up the time allotted to Olup, which then resulted in a restriction of time for rebuttal and the impossible position of electing between rebuttal and closing argument.

The witnesses aforementioned should not have been permitted to testify. There was no justification for failing to disclose their identity or the substance of their offered testimony. Their testimony prejudiced Olup and was harmful to Olup, who was unable to counter the testimony, considering the time constraints for the case, as dictated by

the lower court.[4] Olup also maintains that the testimony of Carmen Torockio, the Budget Director of the County, should have been disallowed. Torockio was hired in September 1997 – well after Olup's termination. He was not the budget director in 1996, but was recruited by the former County Controller and now Judge Frank Lucchino and Commissioner Dawida after the fact. The lower court denied an offer of proof on this witness and permitted him to testify. Over objection, Torockio testified at length as to countywide finance and budget concerns – which had nothing to do with the airport budget. This testimony was prejudicial to Olup and was not relevant to financial issues surrounding Olup's discharge from the Department of Aviation.

Accordingly, the allowance of last-minute witnesses was prejudicial and fatal to Olup's case.

d. Denial of Transcript

---

[4] The substance of Florian's trial testimony is especially disturbing in light of the lower court's finding at footnote 5, Page 6 of the Opinion and Order of April 26, 1999. Concerning Florian's role in the termination of Olup, the trial court stated: "... The record does not support such a claim [Florian played a role in the termination]. The uncontradicted record evidence indicates that Florian was simply handed a list naming employees subject to termination. The fact that Florian made efforts to save a few employees on the list, but not Olup, does not support any assertion that Florian made the decision to terminate him. Neither does the fact that Florian signed the termination notice." (emphasis added) In light of this specific finding, Florian's offered testimony as to Olup's "job performance" should have been summarily excluded at trial.

As discussed, your Petitioner filed two separate Motions with the lower courts seeking to correct or modify the record and to obtain leave of court to obtain the original stenographic notes. On May 31, 2000, the trial court denied Petitioner's Motion. On September 1, 2000, the Third Circuit denied the Motion.

Your Petitioner moved both courts pursuant to Rule 10(e) of the Rules of Appellate Procedure to permit correction or modification of the record so to ensure that the record accurately reflected what happened in the District Court. Your Petitioner did not seek to add nor subtract documents or information from the record, to supply a new larger record never before the trial court, or not considered by the trial court, nor did your Petitioner seek to include issues that were not before the trial court. To the contrary, your Petitioner simply sought to correct the record to reflect what actually occurred at the trial court level, during trial, while the trial judge was present.

Further, pursuant to 28 U.S.C. §753, "The original notes or other original records and the copy of the transcript in the Office of the Clerk shall be open during office hours to inspection by any person without charge."

By his Motions, Olup sought to correct the original notes and record by the official reporter so to adequately reflect what occurred at trial, and, in addition, to obtain the original stenographic notes, which notes are of public record, to obtain a transcript at his own expense.

The errors and omissions that were subject of the Motions were alleged to be both prejudicial and harmful, and the reporter's omissions in recording those proceedings constitute a failure to

comply with the Court Reporter Act located at 28 U.S.C. §753.

Prejudicial and harmful omissions must be corrected so to accurately reflect the trial record; as the original stenographic notes and records are a matter of public record, and as it is in the best interest of the judicial system, as well as to the parties, to allow access to the original notes, Petitioner should have had access to those notes.

Denial of these Motions did not afford your Petitioner substantial justice or fundamental fairness in preparation of the record and arguments before the trial court and intermediate appellate court.

e. Denial of Oral Argument

Pursuant to Order of Court dated September 1, 2000, the Third Circuit denied your Petitioner's request for oral argument.

Oral argument should have been permitted in this instance so to permit the Appeals Court to acquire further understanding of the issues presented. Moreover, as substantial justice was not done within the trial of this case, and a new trial should have been granted due to the harmful and prejudicial errors that exist, the Third Circuit Court of Appeals erred in denying oral argument.

Employment Performance Evidence

On this issue, the Third Circuit summarily dismissed Olup's claims relative to the admission of employment performance evidence. Here, the appeals court held that the District Court properly ruled that the County could use evidence of em-

ployment performance either to establish a non-discriminatory reason for Olup's dismissal, or to rebut Olup's claim that he was qualified for the position. Moreover, as to the actual admission of employment performance evidence, the appeals court found that Olup failed to identify any way in which the County used employment performance evidence for any purpose other than the above-mentioned reasons.

a. The Motion in Limine

Prior to trial, Olup's counsel submitted a formal written Motion in Limine seeking to exclude all evidence and testimony concerning Olup's performance in employment. The Motion was fact specific as to the grounds justifying the exclusion of any evidence as to job performance. The County filed its response.

The lower court summarily denied the Motion on September 23, 1999, without formal opinion, memorandum or other citation to authority supporting this decision. Consequently, evidence concerning Olup's performance in employment was deemed to be proper subject of inquiry at trial. Moreover, this inquiry was not limited to Olup's job performance at the County of Allegheny Department of Aviation. At trial, the court further permitted the County to elicit opinions from a witness associated with Olup in previous employment – which was patently irrelevant to the reasons surrounding his termination from the County of Allegheny.

In many cases, job performance may be, in fact, a relevant issue. Job performance is relevant where the reason for the plaintiff's termination is

specifically job performance. More to the point, the employer may elicit testimony relative to a plaintiff's job performance (for example, in defense to a claim for age discrimination), where the plaintiff was discharged because of his performance. The focus, then, is on the reason or reasons for the termination at the time of termination. *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326 (3d Cir. 1995); *Armbruster v. Erie Civic Center*, 537 F. Supp. 484 (W.D. Pa. 1995); *Sorba v. Pennsylvania Drilling Co., Inc.*, 821 F.2d 200 (3d Cir. 1987).

In this case, it is clear that Olup was involuntarily dismissed from employment with the County of Allegheny through "NO FAULT OR ACT OF HIS OWN". This was the County's admitted and specific reason for his termination on February 23, 1996. This stated reason appears on Olup's "Termination of Service" document, which was signed by his supervisor – Peter Florian – and entered into evidence at trial. The lower court recognized and cited this in the Opinion and Order dated April 26, 1999, concerning the County's Motion for Summary Judgment.

There was absolutely no indication in this case – in any written document: performance evaluation, PAA-100, "Termination of Service" notice, or letter of dismissal, which remotely states or even suggests that Olup's lack of performance played any part in the decision to terminate his employment. Thus, at the time of termination, job performance was not a factor. Had job performance been a factor, the County (through its own documents, and by its own "hand") could have easily documented "lack of performance" as a reason to justify discharge. Instead:

- Olup's PAA-100 is silent as to the reason for discharge and makes no mention of performance-related issues.
- Olup's "Termination of Service" document has a line item for entry of explanation where the employee is "dismissed for cause"; there is no mention of cause for dismissal; the block that is checked is through "no fault or act of his own".
- Mr. James Massare's letter to Olup dated February 23, 1996, terminating employment makes no mention of performance as a basis for termination;
- The County offered no written performance evaluations to justify the termination.

FURTHER, IN DEPOSITION AND TESTIMONY, COMMISSIONER DUNN INDICATED THAT PERFORMANCE WAS NOT AN ISSUE; HE ALSO STATED THAT HE WAS THE INDIVIDUAL THAT TERMINATED OLUP AND THAT OLUP'S INVOLUNTARY TERMINATION WAS NOT A REFLECTION OF HIS WORK PERFORMANCE WITH THE COUNTY.

Further, neither the County's Answer nor Pre-trial Statement even mentions job performance as a factor in the discharge. Specifically, the County notes that "in fact [Olup] was terminated because the newly elected majority County Commissioners believed that they had been elected on a platform of reducing costs as well as fees and therefore making the airport more attractive to clients such as USAir and other airlines."

By comparison, those cases that permit inquiry into a plaintiff's employment performance adhere to a set pattern of proof:

- Performance was the documented reason for the termination;
- Written performance evaluations were offered to support the reasons for termination;
- Testimony was permitted to supplement written evidence and to support the stated reason for termination of lack of performance.

In denying Olup's Motion in Limine, the lower court permitted two things to occur: 1) It allowed the County to call witnesses to testify as to Olup's job performance when performance was not a factor in the decision to discharge; and 2) It permitted the County to interject a defense to Olup's claims that went far beyond the County's specific stated and admitted reasons for the termination.

Under the circumstances of this case, Olup's job performance was irrelevant. Denial of Olup's Motion in Limine constituted error in this case.

Even in the absence of a formal motion in limine, the admission of evidence of Olup's performance in employment was an error and constituted an abuse of discretion. The fact of the matter at bar is that Olup's performance was <u>not</u> a factor documented in the circumstances surrounding his involuntary termination. The County's own documents are clear – Olup was not terminated for performance-related concerns. Therefore, that matter is conclusive, and any evidence offered to contradict that fact is irrelevant to the County's stated reasons for Olup's termination.

Admission of this evidence constrained Olup to attempt to defend against a parade of unidentified and last minute witnesses offered by the County, who commented on Olup's performance at both the County and at the Port Authority of Alle-

gheny County. Those witnesses' personal opinions and observations were post-hoc attempts to circumvent a conclusive matter admitted to by the County – that no performance-related matters or issues surrounded Olup's termination. Forcing Olup to defend against this evidence affected the entirety of the trial, and further affected Olup's substantial rights to adequately defend against issues not reasonably anticipated as subject of trial.

b. The Opinion Testimony

There was also error or an abuse of discretion in allowing opinion testimony concerning Olup's work performance. Some of these work performance "opinions" were, at times, over ten years removed from the specific issues in the case – age, politics and the First Amendment. Specifically, the court permitted Peter Florian to offer his perceptions about Olup's work at the County of Allegheny. Further, Mike Simmeth and William Jack were also permitted to testify about their perceptions of Olup's work performance, further prejudicing Olup's case. The court also permitted Theodore Hardy to testify as to his perceptions of Mr. Olup's work at the Port Authority of Allegheny County.

These after-the-fact opinions were irrelevant to the County's stated reasons for termination. Moreover, the witnesses' perceptions were unsupported by documentary evidence – such as performance evaluations or any written documentation. Nothing was submitted by the County to even support such perceptions. However, the County was able to use a parade of assassination witnesses that undoubtedly moved the jury to its fatal verdict.

Moreover, any opinions or evidence concerning Olup's performance in employment with the Port Authority – which ended in 1986 - are clearly irrelevant to any issue between Olup and the County of Allegheny. There is no possible connection between Olup's performance with the Port Authority and with the County. Indeed, at trial the lower court specifically noted that the County and the Port Authority were two separate entities. Theodore Hardy's perceptions of his working relationship with Olup have no bearing upon the case and his testimony neither proved nor disproved any fact at issue between the litigants.

The only conceivable purpose for calling Mr. Hardy as a witness was in attempt to assail Olup's character and person. Olup never placed his character at issue in this case. Mr. Hardy's comments and opinions (again, without documentary support) could do nothing more than confuse the issues before the jury, mislead the jury, or unfairly prejudice Olup. As soon as Mr. Hardy was permitted to testify by the lower court, Olup was then required to face the onerous task of defending against testimony unrelated to the issues, the substance of which was entirely collateral to the reasons for Olup's termination.

Olup maintains that the lower court's allowance of Mr. Hardy's testimony, standing alone, is singularly erroneous and an abuse of discretion. His testimony was offered as nothing more than a character assassination. Allowance of this testimony alone is ground for a new trial.

Once the County set forth its specific reasons for Olup's termination on February 23, 1996, it should not have been allowed to circumvent its own proffered reasons for discharge. In allowing af-

ter-the-fact opinion testimony about Olup's performance, both with Allegheny County and with the Port Authority, the lower court subjected Olup to irrelevant and prejudicial evidence well beyond the scope of the issues in the case.

Jury Charge

In charging the jury on the First Amendment claim, the trial court instructed that Olup was required to prove "that his political affiliation was a determining factor in the defendants' decision to discharge him." The court also defined "determining factor" to mean: "But for [Olup's] political affiliation, he would not have been terminated, even though other factors may also have played a role in that decision."

The Third Circuit concluded that the trial court's charge to the jury (on "determining factor") was incorrect, citing the appeal's court's decision in *Suppan v. Dadonna*, 203 F.3d 228, 235-236 (3d Cir. 2000). In *Suppan*, the Third Circuit reiterated plaintiff's burden to be that of "substantial" or "motivating factor" in the burden-shifting substantial factor/same decision framework.

As noted in *Mt. Healthy v. Doyle*: in a First Amendment retaliation case, the plaintiff has the initial burden of showing that his constitutionally protected conduct was a "substantial" or "motivating" factor in the relevant decision. *Mt. Healthy*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977) (citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270-72, N.21, 97 S.Ct. 555, 50 L.Ed. 450 (1977). Once the plaintiff carries this burden the burden shifts to the defendant to show "by a preponderance of the evi-

dence that it would have reached the same decision even in the absence of the protected conduct."

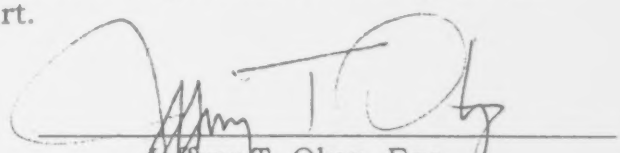
Thus, Olup is not required to prove that politics was a "determining" factor in the decision to terminate.

Notwithstanding this, the appeals court then said that the:

> jury charge approximated the correct standard, only apportioning the burden of production and risk of nonpersuasion improperly. After a thorough review of the record, it appears that the County offered sufficient evidence to satisfy the burden of production. Furthermore, it seems most unlikely that the jury decided this case in the Defendants' favor because it found the evidence to be absolutely in equipoise.

The question here is whether the lower court's instruction to the jury, and the failure to reverse "would result in a miscarriage of justice" in the context of plain error. It cannot be gainsaid, that the jury must be properly instructed on the burden of proof in a civil case. Here, the lower court's instruction to the jury was more restrictive in scope than the standard of proof that Olup was to bear at trial. A jury does not understand and it would not understand appellate review of the "apportionment" of the "burden of production and risk of nonpursuasion." Here the jury was told to deliberate upon the evidence within the strictures of a discriminatory reason being the "determining factor" leading to Olup's termination, which is directly contrary to this Court's dictates in *Mt. Healthy*. Here, the appropriate directives were not provided

to the jury by the trial court – a fact finder could reasonably be led to believe that Olup was required to prove that the discriminatory reason – politics – was the lone factor in the decision to terminate, as opposed to the "motivating" factor. Moreover, in reading the charge to the jury in its entirety, one can readily see that the trial court essentially provided two similar instructions to the jury (on both the issues of age and politics and the application of a "determining" factor test), where, more appropriately, two different burdens of proof applied. THE THIRD CIRCUIT NOTED THAT THE TRIAL COURT COMMITTED ERROR IN THE INSTRUCTION RELATIVE TO OLUP'S FIRST AMENDMENT CLAIM. Yet, despite this, the Third Circuit then concluded, somehow, that the jury could not find the "evidence to be absolutely in equipoise" – thus second-guessing the effect of an improper instruction given to the jury. One must reasonably conclude that the error (clearly noted by the Third Circuit), is fundamental error, highly prejudicial, and the instruction is such that the "jury is without adequate guidance on a fundamental question." See *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 275-276 (3d Cir. 1998). Both the lower court and intermediate court's failure to note and consider the error has now resulted in a gross miscarriage of justice, calling for the exercise of judicial review by the Supreme Court.



Jeffrey T. Olup, Esq.
Counsel for Petitioner,
Thomas V. Olup

No.

In The

Supreme Court of the United States

THOMAS V. OLUP,

Petitioner

v.

COUNTY OF ALLEGHENY DEPARTMENT OF AVIATION, ET AL.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

APPENDIX

Jeffrey T. Olup, Esq.
Counsel of Record for Petitioner
BASSI, McCUNE & VREELAND, P.C.
111 Fallowfield Avenue
P.O. Box 144
Charleroi, PA 15022
(724) 483-5502

Table of Contents
Appendix

Opinion and Order dated April 26, 1999	1
Opinion and Order of Court dated November 30, 1999	14
Order of Court (handwritten) dated May 31, 2000	19
Orders of Court dated September 1, 2000	20, 21
Memorandum Opinion and Judgment dated September 20, 2000	22
Order of Court dated October 27, 2000	35
Certified Judgment dated November 6, 2000	36
Constitutional Provisions, Statutes, Ordinances and Regulations Involved in the Case	37

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS V. OLUP,)
Plaintiff,)
-vs-)
Civil Action No. 97-132
COUNTY OF ALLEGHENY)
DEPARTMENT OF)
AVIATION, et al.,)
Defendants.)

AMBROSE, District Judge

OPINION
and
ORDER OF COURT

On January 16, 1997, Thomas V. Olup ("Olup"), an engineer formerly employed by the Allegheny County Department of Aviation, commenced suit against Allegheny County, alleging that his termination on February 23, 1996 was premised upon his age, in violation of the Age Discrimination in Employment Act ("ADEA"). Approximately nine months later, Olup amended his Complaint to include a claim of age discrimination under the Pennsylvania Human Relations Act ("PHRA").

On January 18, 1998, Olup initiated a second suit against Allegheny County and its three current Commissioners,[1] both in their official and individual capacities. Olup initially claimed that the Defendants violated his civil rights under 42 U.S.C.

[1] Robert Cranmer, Mike Dawida and Larry Dunn

§1983 by retaliating against him for the exercise of his First Amendment rights to free speech and free association. Approximately one month later, Olup amended this second action to include two additional counts. Specifically, Olup claimed that his termination arose as a result of disability discrimination, in violation of the Americans With Disabilities Act ("ADA") and of the Rehabilitation Act. The Amended Complaint also added five additional Defendants,[2] all of whom were former Directors or Deputy Directors of the Greater Pittsburgh/Pittsburgh International Airport.

On September 15, 1998, the Honorable Judge Standish issued an Order consolidating both cases at Docket No. 97-132. On or about October 14, 1998, the Clerk of Courts reassigned this case to me.

Pending is a Motion for Summary Judgment (Docket No. 48) filed on behalf of all Defendants. The Defendants argue that the civil rights claims are deficient because the record is devoid of any evidence that the Commissioners who made the decision to terminate his employment had, prior to his termination, any idea of his age, political affiliation, allegedly protected speech or medical condition. The Defendants also contend that their decision to eliminate Olup's position is shielded from liability by the doctrine of legislative immunity. As to the claim of disability discrimination, the Defendants again raise the issue of knowledge, and add that Olup is not "disabled" within the meaning of the ADA or the Rehabilitation Act. With respect to the ADEA claim,

---

[2] Peter Florian, William Stuenkel, Scott O'Donnell, Herb Higginbotham and Guy Tumulo

the Defendants repeat the alleged lack of knowledge argument. Finally, the Defendants contend that certain of the conduct for which Olup seeks redress occurred beyond the statute of limitations period.

After careful consideration, and for the reasons set forth below, the Motion for Summary Judgment is granted in part and denied in part. The Motion is granted with respect to the ADA and Rehabilitation Act claims. The Motion is further granted as to all claims against Defendants Dawida, Stuenkel, O'Donnell, Higgenbotham, Tumulo and Florian. The Motion is denied in all other respects.

STANDARD

Summary judgment may only be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law. Fed.R. Civ. P. 56(c). Rule 56 mandates the entry of judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In considering a motion for summary judgment, the court must examine the facts in the light most favorable to the party opposing the motion. International Raw Materials, Ltd. v. Stauffer Chemical Co., 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence is such that a reasonable jury could not return a verdict for the

non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is material when it might affect the outcome of the suit under the governing law. Id. Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the nonmovant's burden of proof at trial. Celotex, 477 U.S. at 322. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. Id. at 324.

ANALYSIS

I. Civil Rights Claims – Alleged Lack of Knowledge

The Termination of Service Notice dated February 23, 1996, indicates that Olup was: Dismissed through no cause or act of his or her own. See Docket No. 55, Ex. F. The Defendants contend that Commissioners Dunn and Cranmer acted to terminate Olup's employment as part of a perceived voter mandate to reduce the size of government. Olup counters that the termination arose, in part, as a result of retaliation for the exercise of his First Amendment rights. Specifically, Olup contends that his termination arose due to his voiced objections over certain County practices and due to his political affiliation.

"To show a prima facie First Amendment violation wrought by retaliatory discharge, the employee must establish that he was engaged in conduct protected by the First Amendment, and that the discharge was 'motivated by' or 'substantially caused by' the exercise of First Amendment rights." DeGennaro v. New York City Housing Authority, Civ. No. 92-5985, 1995 WL 37850 at * 3 (S.D. N.Y. Jan. 31, 1995), quoting, Gilardi v. Village of Pawling, 18 F.3d 188, 194 (2d Cir. 1994) (citations omitted). See also Fogarty v. Boles, 121 F.3d 886, 888 (3d Cir. 1997), citing, Green v. Philadelphia, 105 F.3d 882, 885 (3d Cir. 1997) (stating, in regard to a free speech case, that "[i]n some cases, the First Amendment protects public employees from retaliation by their employer. Under 42 U.S.C. § 1983, public employees may sue to enforce that protection if (1) they spoke on a matter of public concern; (2) their interest in that field outweighs the government's concern with the effective and efficient fulfillment of its responsibilities to the public; (3) the speech caused the retaliation; and (4) the adverse employment decision would not have occurred but for the speech."); and Rini v. Zwinn, 886 F. Supp. 270, 286-87 (E.D. N.Y. 1995) (addressing a § 1983 claim of retaliation for exercise of the right to association); and Olmeda v. Schneider, 889 F. Supp. 228, 232-33 (D. V.I. 1995) (same).

Here, the Defendants acknowledge that "the Plaintiff may have been a registered Democrat or have engaged in some form of public or internal criticism that could, *arguendo*, earn the sobriquet of protected speech. "See Docket No. 49, p. 9. Instead, they challenge the element of causation. According to the Defendants, "[w]hen making the

decision to terminate the Plaintiff, neither Commissioners Cranmer or Dunn knew anything about the Plaintiff including his age, his medical history, or his political affiliation." Docket No. 49, pp. 4 and 7.

I do not agree with the Defendants' reading of the proffered evidence. In two instances the Defendants direct this Court's attention to pages 46 and 55 of Dunn's deposition as evidentiary support for the notion that Dunn, the apparent decisionmaker, lacked knowledge of Olup's allegedly protected speech and/or political association. See Docket No. 49, pp. 4 and 7. Yet I have reviewed the cited pages and conclude that they do not contain any testimony indicating that Dunn was unfamiliar with Olup in these respects.

Furthermore, James Massare, the Director of Administration who implemented the termination in accordance with Dunn's and Cranmer's wishes, testified that he signed off on the termination notices because:

> I believe – it was said to me – that is the reason I signed off on him and the others, that his position was high enough and of such a nature – policymaking, related to that – that he could be legally let go and that the new commissioners, new administration, wanted to wherever possible put in people who share their philosophy of government in the positions that were legally appropriate for them to do so.

Massare Dep., p. 13-14.[3] This can fairly be viewed as an acknowledgment that Olup was terminated precisely because of his political affiliation. Thus, regardless of whether Dunn and Cranmer knew specifically of Olup, the record contains evidence indicating that Dunn and Cranmer made decisions based upon political associations.[4] Finally, as regards the Defendants' proffered reason for termination, reduction of the size of government, the record contains evidence suggesting that Olup's position was not, in fact, eliminated following his termination. See Florian Dep., p. 141.

Accordingly, for the reasons set forth above, I find that genuine issues of material fact exist which preclude the entry of summary judgment on Olup's civil rights claims.[5]

---

[3] Cranmer testified that Massare did have input in determining which employees would be fired. See Cranmer Dep., p. 53.

[4] Significantly, in moving for summary judgment, the Defendants do not assert that Olup, in fact, held a policymaking position. Furthermore, Olup has proffered evidence indicating that he did not hold a policymaking position. See Tumulo Dep., p. 41-42.

[5] I note, however, that Olup has not proffered any evidence indicating that Defendants Dawida, Stuenkel, O'Donnell, Higgenbotham and Tumulo had any meaningful input in the decision to terminate him. Although Olup urges that Florian did play a significant role, the record does not support such a claim. The uncontradicted record evidence indicates that Florian was simply handed a list naming employees subject to termination. The fact that Florian made efforts to save a few employees on the list, but not Olup, does not support any assertion that Florian made the decision to terminate him. Neither does the fact that Florian signed the termination notice. Consequently, the Motion for

II. **All Claims – Legislative Immunity**

The Defendants also urge that the doctrine of legislature immunity shields them from liability. The parties agree that the Supreme Court's decision in Bogan v. Scott-Harris, ___ U.S. ___, 118 S.Ct. 966, 970 (1998) extended the doctrine of legislative immunity to local officials. Olup similarly agrees with the basic proposition that local officials are entitled to immunity for any actions taken in their legislative capacity. Rather, Olup contends that the decision to terminate his employment in this instance does not fall within the scope of legislative activity.

In Bogan, the Supreme Court observed that "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." Bogan, 118 S.Ct. at 972. The Court explained that "it is simply 'not consonant with our scheme of government for a court to inquire into the motives of legislators." Id. at 973, quoting, Tenney v. Brandhove, 341 U.S. 367, 371, 71 S.Ct. 783, 785 (1951). Thus, a defendant who allegedly "singled out the plaintiff for investigation in order 'to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutioinal rights,' was entitled to immunity where he had acted in a legislative capacity. Bogan, 118 S.Ct. at 973, quoting, Tenney, 341 U.S. at 371, 71 S.Ct. at 785.

Given this guidance, I need not dwell, for purposes of this issue, on Olup's assertion that the Defendants terminated his employment because he

---

Summary Judgment will be granted in favor of the above-named Defendants.

did not share their political philosophy. See Docket No. 54, p. 18. The Bogan court makes clear that the Commissioners' motives are irrelevant. Instead, I must determine whether the decision itself, and the method of its implication, was made in a legislative capacity.

While the Defendants urge that their actions in terminating Olup's employment are analogous to those declared as protected by the doctrine of legislative immunity in Bogan, the record is devoid of facts sufficient for me to reach such a conclusion. In Bogan, the Defendants introduced a budget and voted for and signed into law an ordinance. The budget and ordinance called for the elimination of the plaintiff's department. The Court stated that:

> [t]he ordinance reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents. Moreover, it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office.

Bogan, 118 S.Ct. at 973.

Here, there is no evidence that Olup's position was eliminated,[6] and that any such elimination occurred pursuant to a new budget or ordinance. Indeed, the only information provided by Defendants suggests that the Commissioners

---

[6] Indeed, Olup has proffered evidence indicating that his position was not eliminated. See Tumulo Dep., p. 41-42.

merely fired a particular employee – something the Bogan court warned did not deserve protection.

Because the record lacks the evidence necessary to establish that the Defendants are entitled to the entry of judgment as a matter of law in their favor, the Motion is denied.

III. ADA and Rehabilitation Act Claims

The Defendants offer two bases, one of which I have already rejected,[7] upon which to grant summary judgment in their favor on Olup's ADA and Rehabilitation Act claims. The Defendants contend that Olup is not "disabled" within the meaning of the ADA and/or the Rehabilitation Act.

It is undisputed that Olup suffered from prostrate cancer in 1993. He contends that he suffers in two manners as a result of this condition: incontinence and impotence. Significantly, however, Olup has not proffered any evidence concerning impotence. Indeed, Olup simply observes that incontinence and impotence are two frequent side effects of prostrate cancer. See Olup Dep., p. 430. Olup does not even claim to suffer from impotence, much less demonstrate how such an impairment substantially limits any major life activity. Similarly, as to incontinence, Olup does claim to currently suffer from this impairment. See Olup Dep., p. 426. Yet he does not contend that this impairment substantially limits a major life activity. He does not proffer evidence indicating (contrary to

---

[7] The Defendants claim ignorance of any claimed disability and thus reason that the termination could not have occurred because of the disability. As stated above, however, the Defendants have not proffered sufficient evidence in support of this assertion with respect to Dunn and Cranmer

his counsel's assertions) that his mobility is in any way restricted. Apparently Olup would have this Court adopt a *per se* rule holding that incontinence necessarily substantially limits a major life activity. Olup has not cited to any case law in support of such a holding.

Although neither party identified any relevant case law on this matter, independent research revealed two courts which have rejected similar claims. See Farmer v. National City Corp., Civ. No. 94-966, 1996 WL 887478 at * 6 (S.D. Ohio April 5, 1996) (finding that incontinence and impotence arising as side effects from prostrate cancer do constitute physical impairments, but do not substantially limit any major life activity); and Swain v. Hillsborough County School Board, 146 F.3d 855 (11th Cir. 1998) (rejecting a claim that an individual suffering from incontinence was disabled within the meaning of the ADA). Consequently, the Defendants' Motion for Summary Judgment is granted in this regard.[8]

IV. ADEA Claim – Causal Nexus

The Defendants also devote five sentences to an argument that there can be no causal nexus between Olup's protected status and the decision to terminate him because the Commissioners were

---

[8] While Olup asserts in his Brief in Opposition to Summary Judgment that he heard co-workers say "how long can he last anyway?", Olup has not proffered any evidence supporting this assertion. Nor did Olup, in his Brief, identify the co-worker or explain whether the co-worker had any role in the termination decision. Consequently, the record is devoid of any evidence indicating that the Defendants' "perceived" him to have a disability.

unaware of his age. As stated above, however, I disagree with the Defendants' synopsis of the testimony. Therefore, the Motion is denied.[9]

V. All Claims – Statute of Limitations

Finally, the Defendants contend that "[b]ased on Plaintiff's various complaints, he seeks recovery from both the County and all of the individually-named [sic] Defendants for alleged injuries which took place prior to the two-year period of limitation." See Docket no. 49, p. 19-20. Olup responds that he "is not seeking damages for any actions which occurred outside the relevant statute of limitations." See Docket No. 54, p. 23. "Rather," Olup explains, "the facts which occurred prior to the relevant statutory period are provided as a back drop to Plaintiff's termination," and he "is seeking recovery only for damages he has sustained due to his termination in February, 1996." Id., at 23.

I agree. Olup's causes of actions are all predicated upon his termination. The termination occurred less than two years prior to the filing of the individual suits. As such the claims are timely.

################

DATE FILED: APRIL 26, 1999
PLAINTIFF'S COUNSEL: LIEBER & HAMMER
ATTN JAMES B. LIEBER ESQ
5528 WALNUT ST
PITTSBURGH PA 15232

---

[9] As an apparent afterthought, the Defendants add that Olup's claim is deficient because he was not replaced by a younger worker. The Defendants have not, however, identified any factual evidence in support of this assertion.

DEFENDANT'S COUNSEL:

EVANS PORTNOY & QUINN
ATTN JOHN E QUINN ESQ
301 GRANT ST 36TH FL
PITTSBURGH PA 15219-6401
ALLEGHENY LAW DEPT
ATTN CAROLINE LIEBENGUTH ESQ
445 FORT PITT BLVD STE 300
PITTSBURGH PA 15219

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS V. OLUP)
Plaintiff,)
-vs-)
Civil Action No. 97-132
COUNTY OF ALLEGHENY)
DEPARTMENT OF)
AVIATION, et al.)
Defendants.)

AMBROSE, District Judge.

ORDER OF COURT

AND NOW, this **26th** day of April, 1999, after careful consideration, and for the reasons set forth in the Opinion accompanying this Order, it is **ORDERED** that the Motion for Summary Judgment (Docket No. 48) is granted in part and denied in part. It is **GRANTED** with respect to the claims asserted under the ADA and Rehabilitation Act. It is further **GRANTED** as to all claims asserted against Defendants Dawida, Stuenkel, O'Donnell, Higgenbotham, Tumulo and Florian. The Motion is **DENIED** in all other respects.

BY THE COURT:

/s/ Donetta W. Ambrose
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS V. OLUP,)
Plaintiff,)
-vs-)
Civil Action No. 97-132
COUNTY OF ALLEGHENY)
et al.,)
Defendants.)

AMBROSE, District Judge

OPINION
and
ORDER OF COURT

Pending is Plaintiff's Motion for a New Trial (Docket No. 79) and Defendant's Response (Docket No. 85). The Motion is **DENIED** in its entirety as being without merit. I will, nevertheless, make a brief statement about each of Plaintiff's proferred bases for his Motion.

I. Plaintiff argues that potential jurors were dismissed "for cause" because they were residents of Allegheny county. Had counsel bothered to ask trial counsel or even his client, about this argument he would know it was entirely inaccurate. No juror was dismissed for cause because of his/her residence. Counsel's representation to the Court on this issue was obviously not made "after an inquiry reasonable under the circumstances" and borders

on conduct falling within Rule 11(c)(1)(B). Federal Rules of Civil Procedure.

II. Plaintiff's Motion in Limine seeking to exclude evidence concerning Plaintiff's performance in employment was properly denied. Defendant was entitled to introduce this evidence to meet its burden of establishing a legitimate, nondiscriminatory reason for Plaintiff's termination and to impeach Plaintiff's claim that he was a good employee.

III. Defendant's evidence of Plaintiff's poor job performance was properly admitted in Defendant's case-in-chief since such evidence was admitted to refute and impeach Plaintiff's direct evidence in his case-in-chief.

IV. Evidence of Plaintiff's job performance at the County was properly admitted by Defendant to satisfy its burden of establishing a legitimate nondiscriminatory business reason for terminating Plaintiff.

Furthermore, trial counsel made no objections to the offers of this testimony other than the filing of the Motion in Limine.

V. Time limits were imposed on the parties on the basis of estimates given by the parties at the Pre-Trial Conference. No party was given less time than requested at the Pre-Trial Conference. No party asked for additional time during the trial. At the conclusion of Defendant's case-in-chief, I asked the Plaintiff's counsel if he had rebuttal witnesses and he responded "No". No objection to the time limits was ever made. The trial encompassed seven (7) day, which the record will clearly show was sufficient time for the trial.

VI. Defendant's Motion for Summary Judgment was properly granted for the reasons set

forth in the Opinion and Order disposing of that Motion.

VII. The testimony of Florian, Hardy and Walluck was properly admitted. Florian was deposed prior to trial and listed on Defendant's Pre-Trial Statement. Hardy and Walluck were called to refute statements made by Plaintiff in his direct testimony. Plaintiff placed his credibility at issue by testifying to certain facts on direct examination. Defendant, which listed both Florian and representatives of the Port Authority on its Pre-Trial Statement, was entitled to present testimony to the contrary.

Furthermore, Plaintiff's current position that he was placed in the "impossible position of electing between rebuttal and closing argument" is not substantiated by the record. Plaintiff's counsel clearly indicated that he had no rebuttal witnesses. The weakness of Plaintiff's position is further evidenced by his failure to identify now or at trial whom he wished to call in rebuttal and what testimony those undisclosed witnesses would offer.

VIII. Plaintiff argues that the jury instructions were erroneous. However, Plaintiff fails to point to any place in the record where Plaintiff's counsel specifically objected to the inclusion or exclusion of any of the jury instructions Plaintiff proposes in his Motion for a New Trial. Federal Rule of Civil Procedure 51 states that "(n)o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Plaintiff has filed [sic] to point out where in the record objections were made on those

instructions he now contends were erroneous. Plaintiff's position is without merit.

IX. Plaintiff next argues that Plaintiff's Exhibit 129 was improperly excluded at trial. Although Plaintiff has decided to argue his Motion without benefit of a transcript, it is my recollection that the contents of the exhibit were admitted in a group of forms admitted at another number. Every exhibit Plaintiff desired to have admitted for the jury's consideration was admitted during the this [sic]trial. There were duplications within each party's Exhibits and between Plaintiff's and Defendant's exhibits. The parties' counsels checked all exhibits before they were taken to the jury and no objections were made by either counsel.

Plaintiff's contention that two (2) Defense exhibits were improperly admitted is also without merit. The admission of these exhibits was without objection.

In conclusion, I agree with Defendant's assessment of Plaintiff's Motion and Brief as being an attempt to argue matters not properly preserved at trial for review.

BY THE COURT:
/s/ Donetta W. Ambrose
U.S. District Judge

DATE: November 30th, 1999

PC BASSI & ASSOC
ATTN JEFFREY T OLUP ESQ
PO BOX 144
CHARLEROI PA 15022-0144

ALLEGHENY CO SOLICITOR'S OFFICE
ATTN CAROLINE P LIEBENGUTH ESQ

300 FORT PITT COMMONS BLDG
PITTSBURGH PA 15219

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(Handwritten Order) – 5/31/00

"Denied, after careful consideration of the parties' submissions."

/s/ Donetta W. Ambrose

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

July 13, 2000

No. 99-4040

THOMAS V. OLUP,
Appellant

v.

COUNTY OF ALLEGHENY DEPARTMENT OF AVIATION, et al.

Present: SLOVITER, SCIRICA, and ALITO, Circuit Judges.

Motion by Appellant for Correction or Modification of the Record and Motion for Leave of Court to Obtain Original Stenographic Notes.

/s/ Charlene Crisden 267-299-4923
Case Manager

Listed for disposition on the merits for 9/15/00.

ORDER

The foregoing motion is denied.

By the Court,

/s/ D.K. Sloviter
Circuit Judge

Dated: Sep 01, 2000
CLC/CC: JTO, CPL, MMM

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

July 13, 2000

No. 99-4040

THOMAS V. OLUP,

Appellant

v.

COUNTY OF ALLEGHENY DEPARTMENT OF AVIATION, et al.

United States District Court for the Western District of Pennsylvania

D.C. No. 97-cv-00132

Present: SLOVITER, SCIRICA, and ALITO, Circuit Judges.

Motion by Appellant for Oral Argument.

/s/ Charlene Crisden 267-299-4923

Case Manager

Calendared for 9/15/99

Response is due 7/24/00

ORDER

The foregoing motion is denied.

By the Court,

/s/ D.K. Sloviter

Circuit Judge

Dated: Sep 01, 2000

CLC/CC: JTO, CPL, MMM

UNREPORTED/NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-4040

THOMAS V. OLUP,
Appellant

v.

COUNTY OF ALLEGHENY DEPARTMENT OF AVIATION, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(Dist. Court No. 97-cv-00132)
District Court Judge: Donetta W. Ambrose

Submitted Under Third Circuit LAR 34.1(a)
September 15, 2000

Before: SLOVITER, SCIRICA, and ALITO, Circuit Judges.

(Opinion Filed: September 20, 2000)

MEMORANDUM OPINION

ALITO, Circuit Judge:

Thomas Olup sued the County of Allegheny (the "County"), claiming that the County had terminated his employment because of his political affiliation, age, and/or disability. The District Court dismissed the disability claim, finding that Olup's prostate cancer and potential side-effects thereof, did not constitute a disability. A jury found for the County on the other claims.

Olup moved for a new trial, contending that the District Court improperly 1) struck jurors for cause because they resided in Allegheny County; 2) denied a motion in limine to prevent the introduction of evidence concerning Olup's employment performance history; 3) admitted

evidence concerning Olup's employment performance history; 4) limited counsel's time at trial; 5) granted summary judgment on the disability discrimination claims; 6) allowed surprise witnesses to testify; 7) instructed the jury that Olup must show that discrimination was the "determinative" factor rather than the "motivating" factor in his termination; and 8) admitted into evidence two inadmissible exhibits. The District Court denied the motion. Olup now appeals that denial, alleging the same eight errors.

I.

In February 1996, the County dismissed Olup from his position as Assistant Director of Engineering and Planning. Olup had held that position for nearly ten years and the Termination of Service document from the County listed the reason for termination as "through no cause or act of his own."

Olup filed suit under 42 U.S.C. § 1983 and 42 U.S.C. § 1981(a) alleging that the County had violated his First Amendment rights, as well as his rights under the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq. ("ADA"), the Rehabilitation Act, 29 U.S.C. § 794 ("RA"), the Age Discrimination and Employment Act, 29 U.S.C. § 621 et.seq. ("ADEA"), and the Pennsylvania Human Relations Act, 43 P.S. § 951 et.seq. ("PHRA"). Olup based his constitutional claim on his affiliation with the Democratic Party in what became, as of 1996, a Republican-controlled county. He based his ADA claim on his 1993 battle with prostate cancer and subsequent susceptibility to incontinence, impotence, and nasal polyps. Lastly, he based his ADEA claim on his age of 60 at time of termination.

The County defended against the First Amendment and ADEA claims by offering a nondiscriminatory motive for Olup's termination: cost-cutting. The County argued that Olup's position was no longer necessary. The County further argued that Olup's performance had been deficient, making him a prime candidate for elimination. The County defended against the ADA claim by arguing that Olup did not have a disability within the meaning of the ADA.

The County moved for summary judgment on all claims. The District Court granted summary judgment on the ADA claim. Olup's First Amendment and ADEA claims proceeded to trial, where a jury found for the County.

II.

We review Olup's claim that the District Court improperly struck jurors for cause for abuse of discretion. See United States v. Calabrese, 942 F.2d 218, 222-23 (3d Cir. 1982). Although no transcript exists from the voir dire, the District Court stated that no jurors were stricken because of their residency. See Opinion and Order of Court at 15 (11/30/99) ("Opinion"). Rather, jurors were dismissed for cause only when they indicated to the Court that they could not render a fair and impartial verdict because of a range of beliefs concerning politicians, workplace discrimination, and like matters. Id. On the record before us, we reject Olup's argument.

III.

The crux of Olup's two points of appeal concerning employment performance evidence is that the District Court should have allowed the County to argue only that it terminated Olup "through no fault of his own," as the Termination

Notice stated. See Brief for Appellant at 18-19. However, the County instead argued that both cost-cutting and Olup's performance resulted in the decision to terminate him.[1] We review the District Court's denial of the Motion in Limine and refusal to exclude evidence for abuse of discretion. See In re Merritt Logan, Inc., 901 F.2d 349, 359 (3d Cir. 1990).

As to Olup's Motion in Limine, the District Court properly ruled that the County could use evidence of employment performance either to establish a nondiscriminatory reason for Olup's dismissal or to rebut Olup's claim that he was qualified for the position. See Opinion at 3. Olup gives no basis for his contention that since the termination notice states that Olup was fired because of "no fault or act of his own," the Court should have constrained the County to that explanation. Any discrepancy between the notice and the County's position at trial was for the jury to assess.

As to the actual admission of the employment performance evidence, Olup has failed to identify any way in which the County used the employment performance evidence for any purpose other than these above-mentioned legitimate ones.

Thus, Olup's second and third claims are without merit.

IV.

---

[1]The County's precise argument was that Olup's deficient performance necessitated the lessening of his duties, until his actual position became unnecessary. See Defendants' Pre-Trial Narrative at 2-3.

The District Court imposed strict time restrictions on the parties during trial.[2] Since this issue was not raised and properly preserved during trial, we review for plain error. See United States v. Olano, 507 U.S. 725 (1993).

There is no indication from the record that Olup objected to the time limitations, asked for extra time, or offered evidence that the District Court excluded because of time. In fact, as Olup admits, the trial did not last the full allotted seven days (lasting six and a half days); nor did Olup ask for an eighth day, something to which the Court indicated that it would be amenable. See Brief for Appellant at 28 n.8.[3] Moreover, the seven-day schedule was set according to both sides' estimates of the time needed. See Brief for Appellees at 20-21. Under these circumstances, we cannot say that the time restrictions were unreasonable. See. e.g., United States v. King, 532 F.2d 505, 510 (5th Cir. 1976) (limiting closing arguments to thirty minutes a side found not to be error where appellant's

---

[2] For example, during one admonishment of the lawyers, the Court said, "I told you back in July you had seven days for this trial. That is all you have. I'm telling you. You do not have a minute more. If you want to use all you [sic] time up in direct and cross, and you don't get to close, or only one of you gets to close, that's the rule.... You get the number of minutes that I gave you.... You don't get to put in [sic] your case. You get to use your minutes.... If you use them and run out of them, then you're done; it's as simple as that." T. at 517.

[3] Olup complains that he had no opportunity to offer rebuttal witnesses. See id. at 28. However, when asked if there were any rebuttal witnesses for the Plaintiff, Olup's counsel responded, "No." Order at 3.

counsel neither objected nor requested additional time), cert. denied, 429 U.S. 960 (1976).

V.

Olup's fifth point of appeal is that the District Court improperly granted summary judgment for the County on the ADA/RA claim. The District Court held that Olup did not have a "disability" within the meaning of the ADA. See Opinion and Order of Court at 11-12 (4/26/99).

In reviewing the granting of summary judgment, we "apply the same test the district court should have utilized initially. Inferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion." Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Under the ADA, a plaintiff must prove as part of the prima facie case that "he or she was disabled as defined in the ADA." See Shaner v. Synthes, 204 F.3d 494, 500 (3d Cir. 2000). The ADA defines a disability as "[a] physical or mental impairment that substantially limits one or more of the major life functions of such individual." 42 U.S.C. § 12102(2)(A).

According to the record, Olup's claims centered on two potential effects of prostate cancer-incontinence and impotence. In fact, Olup never alleged that he was impotent, merely that

impotence was a frequent side effect of prostate cancer treatment. Moreover, the record does not include any facts that indicate that his incontinence substantially limited Olup in any life function. Apparently, Olup identified the ability to work and mobility as two major life functions that the incontinence inhibited. At its worst, Olup's incontinence did require him to go to the restroom, on average, every hour.[4] However, Olup admitted that it substantially interfered with neither his work nor mobility. See Deposition of Olup at 427-31. Thus, the District Court properly relied on Swain v. Hillsborough County Sch. Bd., 146 F.3d 855 (11th Cir. 1998) (finding that a school teacher's incontinence from a variety of ailments was not a disability under the ADA), and Farmer v. National City Corp., 1996 WL 887478 (S.D. Ohio) (finding that a bank vice president's incontinence and impotence resulting from prostate cancer treatment were not disabilities under the ADA), to grant summary judgment against Olup on the ADA/RA claim.[5]

---

[4] Many of these trips were to check the status of his sanitary pads, rather than actually to urinate. See Deposition of Olup at 420.

[5] Although Olup correctly notes that the decision of whether a plaintiff has a disability should be reached through individualized inquiry, see Bragdon v. Abbott, 524 U.S. 624 (1998), the District Court did not, in this case, adopt a per se rule that prostate cancer, incontinence, and impotence cannot constitute disabilities under the ADA. See Opinion at 11. Rather, the Court specifically considered Olup's allegations concerning how the afflictions affected his life. Id.

Lastly, Olup claims that his nasal polyps constituted a disability under the Ada. See Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment at 20 (12/24/98). The polyps made Olup sensitive to smoke, and he claimed that his officemate's smoking aggravated the polyps and burned his eyes. Although the District Court did not deal with this argument in its ruling, a review of the record reveals that Olup offered no evidence that the polyps substantially limited a major life function, nor did he allege that they did. See id. at 18-20.

Thus, the District Court properly concluded that Olup had not produced sufficient evidence for the ADA claim to survive a motion for summary judgment.

VI.

Olup's sixth claim is that the District Court abused its discretion in allowing the County to present three last-minute witnesses: Theodore Hardy, Peter Florian, and John Walluck.

Olup's claim fails as to Hardy since Hardy was listed as a witness and, therefore, was not a surprise witness. See Defendant's Pre-Trial Narrative at 6 (12/24/98).

Olup's claim also fails as to Florian. Florian was an original defendant in the suit who had been granted summary judgment.[6] Olup had deposed Florian, making the County's mistake harmless. See F.R.C.P. 37(c)(1). Moreover, Olup failed to object to Florian's testimony at trial on the basis of surprise. T. at 1014-15. Lastly, Florian's testimony

[6] Contrary to the District Court's ruling, Peter Florian was not listed as a witness in the Defendants' Pre-Trial Narrative (although Susanna Florian was).

was appropriate as rebuttal testimony to impeach Olup's prior testimony that he was qualified for his position. Thus, the District Court did not err in allowing Florian to testify.

Olup's claim fails as to Walluck since Walluck's testimony was proper rebuttal testimony. Olup testified that he had recently been offered a job by the Pittsburgh school district through Walluck and had been given a starting date, but that Walluck had withdrawn the job offer when he learned of the lawsuit. T. at 152-54, 298-301. The County called Walluck on rebuttal to testify that Olup never actually received a job offer. T. at 1070-73. Therefore, Walluck's testimony went to Olup's credibility and rebutted Olup's testimony, making its admission appropriate.

VII.

Olup's seventh claim is that the jury instructions improperly instructed the jury on Olup's burden of proof on the ADEA and the First Amendment claims, stating that Olup must show that discrimination was the "determining" or "determinative" factor in his dismissal, rather than merely a "motivating" factor, in order prevail in light of the County's proffered legitimate, nondiscriminatory reason. The issue of whether a jury instruction misstates the law is subject to plenary review. See Hopp v. Pittsburgh, 194 F.3d 434, 440 (3d Cir. 1999).

An objection to jury instructions is not properly preserved simply by submitting an instruction that the court does not give. Rather, a party objecting to an instruction must do so in terms that are sufficient to alert the court that the party believes that an error has been committed. This did not occur here. See Smith v. Borough of

Wilkinsburg, 147 F.3d 272, 277 (3d Cir. 1998) (citing 9A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 2553 at 408, 411 (2d ed. 1995) ("In the absence of a properly specific objection...a party cannot ordinarily claim on appeal that the trial court erred in the giving of an erroneous instruction or the failure to give a requested instruction.")). Moreover, Olup waived any objection that he might have had by agreeing to the County's proposed changes in the jury charge during the charge conference.[7] Under these circumstances, the issue was not properly preserved. See Smith, 147 F.3d at 275.

Since the issue was not properly preserved, we review for plain error, reversing only in "cases where the error is (1) fundamental and highly prejudicial or if the instructions are such that the jury is without adequate guidance on a fundamental question and (2) our failure to consider the error would result in a miscarriage of justice." Alexander v. Riga, 208 F.3d 419, 426-27 (3d Cir. 2000).

A.

At trial, Olup's age discrimination claim required proof that "there [wa]s a 'but-for' causal connection between the plaintiff's age and the employer's adverse action." Miller v. Cigna, 47 F.3d 586, 595-96 (3d Cir. 1995) (en banc). In the District Court's jury charge on the age discrimination claim, it told the jury that "he [Olup] must prove that his age was a determining factor in the defendant's

[7] When counsel for the County suggested that the language in the jury instructions that said "motivating or determinative" should be changed to solely say "determinative," Olup's counsel agreed, saying "Determining it should be." T. at 1218.

decision, that is, it was one of the reasons that prompted the defendant to discharge him and that it played a determining role in the defendant's decision to discharge him." T. at 1196. This charge was correct.

> As to the First Amendment claim: [T]he plaintiff has the initial burden of showing that his constitutionally protected conduct was a "substantial" or "motivating factor" in the relevant decision. Mount Healthy, 429 U.S. at 287, 97 S.Ct. 568 (citing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 270-71 & n.21, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)). Once the plaintiff carries this burden, the burden shifts to the defendant to show "by a preponderance of the evidence that it would have reached the same decision even in absence of the protected conduct." Id.

Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000).

In charging the jury, the District Court instructed that Olup was required to prove "that his political affiliation was a determining factor in the defendant's decision to discharge him." T. at 1201. The Court defined "determining factor" to mean the following: "but for his [Olup's] political affiliation he would not have been terminated, even though other factors may also have played a role in that decision." T. at 480-81. This instruction was not correct, as this Court recently explained in another case:

> Under Mt. Healthy's burden-shifting substantial-factor/same-decision framework, the plaintiff is not required to prove "but for" cause in order to warrant a judgment in his favor. In this framework, the defendants, in proving "same decision," must prove that the protected conduct was not the but-for cause. If, in proving a substantial or motivating factor, plaintiffs were required to prove but-for causation, it would be impossible for defendants to then prove that the same decision would have been made in absence of what the plaintiffs had already shown to be the but-for cause of the decision. While but-for cause is the ultimate question, it is the defendant's burden to prove lack of but-for causation.

Suppan, 203 F.3d at 236.

However, we do not find plain error. Despite the error, as stated above, "but-for cause is [still] the ultimate question." Id. The jury charge approximated the correct standard, only apportioning the burden of production and risk of non-persuasion improperly. After a thorough review of the record, it appears that the County offered sufficient evidence to satisfy the burden of production. Furthermore, it seems most unlikely that the jury decided this case in the defendant's favor because it found the evidence to be absolutely in equipoise. Under these circumstances, we do not believe that our failure to reverse "would result in a miscarriage of justice" as is required for a finding of plain error. Fashauer v. New Jersey Transit Rail

Operations, Inc., 57 F.3d 1269, 1289 (1995) (refusing to find plain error in an incorrect burden of proof charge). See also, Alexander v. Riga, 208 F. 3d at 428-29.

VIII.

Olup's next claim, that Exhibits H and JJ were improperly admitted, has no merit.[8] Both were relevant and admissible in proving the County's proffered legitimate, nondiscriminatory reason. Moreover, both were admitted without objection at trial. T. at 1167.

IX.

Olup's Motion for a New Trial argued the same meritless eight errors rejected above. Therefore, the District Court's denial of the motion was proper.

X.

Based on the foregoing reasons, we affirm the judgment of the District Court.

TO THE CLERK:

Please file the foregoing Opinion.

BY THE COURT:
/s/Samuel A. Alito
Circuit Judge

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was

---

[8] Exhibit H was a salary board showing the creation of a position assumed by John Serpa on a date after Olup's termination used to show that the County did not replace Olup, but instead created a different position. Exhibit JJ was a salary board reflecting the elimination of Olup's position.

submitted under Third Circuit LAR 34.1(a) on September 15, 2000.

After careful review and consideration of all contentions raised by the appellant, it is hereby

ORDERED AND ADJUDGED by this court that the order of the District Court entered on November 30, 1999, be and is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Marcia M. Waldron
Clerk

DATED: September 20, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

90-4040

THOMAS V. OLUP,
Appellant

v.

COUNTY OF ALLEGHENY DEPARTMENT OF AVIATION, et al.

SUR PETITION FOR REHEARING

Present: SLOVITER, SCIRICA, and ALITO, Circuit Judges

The petition for panel rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

By the Court,
/s/Samuel A. Alito
Circuit Judge

DATED: October 27, 2000
CLC/JTO

CPL
MMM

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on September 15, 2000.

After careful review and consideration of all contentions raised by the appellant, it is hereby

ORDERED AND ADJUDGED by this court that the order of the District Court entered on November 30, 1999, be and is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Marcia M. Waldron
Clerk

DATED: September 20, 2000

Certified as a true copy and issued in lieu of a formal mandate on November 6, 2000.
Teste: /s/ Marcia M. Waldron
Clerk, U.S. Court of Appeals for the Third Circuit

Constitutional Provisions, Statutes, Ordinances and Regulations Involved in the Case

I. CONSTITUTION PROVISIONS:

A. U.S. Constitution

1. Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government...

2. Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

B. Pennsylvania Constitution

Article I, Section 7

...The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may

freely speak, write and print on any subject, being responsible for the abuse of that liberty.

II. STATUTES

A. Court Reporter Act

1. 28 U.S.C. §753 – Reporters

b....The original notes or other original records and the copy of the transcript in the Office of the Clerk shall be open during office hours to inspection by any person.

B. Jurisdiction and Venue

1. 28 U.S.C. §1254 – Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

2. 28 U.S.C. §1331 – Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

3. 28 U.S.C. §1343(a)(4) – Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be

commenced by any persona:...(4) to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote.

4. 28 U.S.C. §1367 – Supplemental jurisdiction

(a)...in any action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

C. Declaratory Judgment

1. 28 U.S.C. §2201 – Creation of remedy

(a) In a case of actual controversy within its jurisdiction...any court in the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

2. 28 U.S.C. §2202 – Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

D. Age Discrimination in Employment Act

1. 29 U.S.C. §623 – Prohibition of age discrimination

a. Employer Practices

It shall be unlawful for an employer –

(1) To fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

(2) To limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

2. 29 U.S.C. §626(c)(1) – Record keeping, investigation, and enforcement

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action

upon commencement of action by commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter...

E. Rehabilitation Act

1. 29 U.S.C. §794 – Non-discrimination under federal grants and programs

a. Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in §705(20) of this Title, shall, solely by reason of her or his disability be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

F. Civil Rights

1. 42 U.S.C. §1981 – Equal rights under the law

a. Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. 42 U.S.C. §1983 – Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

G. Americans With Disabilities Act

1. 42 U.S.C. §12112 – Discrimination

a. General Rule

No covered entity shall discriminate against a disability be-

cause of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

H. State Statute – Pennsylvania Human Relations Act

1. 43 P.S. §955 – Unlawful Discriminatory Practices

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification...
(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job-related handicap or disability...to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual...or to otherwise discriminate against such individual...with respect to compensation, hire, tenure, terms, conditions or privileges of employment...if the individual...is the best able and most competent to perform the services required.